provision of "due process of law" has not been applied to divorce actions, and that if it were, as for instance in *Pennoyer* v. *Neff*,[29] there would be no reason for the unfortunate standard by which there is one test as to validity within the state and another as to validity without the state.[30] It is submitted that it would be more accurate to say that, as the action of divorce differs from other actions, conclusions as to what constitutes "due process" in such other actions are not applicable, and that as a matter of fact courts have considered that there is "due process" as intended by the Constitution in a divorce action whether service on the libellee be personal or substituted.[31] Property may be affected by a decree of divorce, but it is affected by the changed status of the parties, and is not proceeded against in the action. For instance, the dower rights of A in certain land depend upon whether or not she is the wife of B. Consequently it is incorrect to draw analogies from actions in which property rights are in question; it should not be concluded that divorces granted on service by publication are without due process of law because the Supreme Court in *Pennoyer* v. *Neff* held that a personal judgment against a non-resident on such service was invalid, and that no title to property passed by a sale under an execution issued upon such a judgment. *S. A.*

DAMAGES—LOSS OF FUTURE PROFITS—Damages for the loss of future profits, as a general rule, cannot be recovered in an action for the breach of a contract,[1] not so much due to the fact that they are profits as to the fact that there are said to be no adequate criteria which will make certain a reasonably accurate measurement.[2] Consequently, since the fault lies not in the profits themselves, but in ascertaining them, the courts are uniformly willing to allow loss of profits to be included in the damages whenever there are facts sufficient to make the verdict more than mere guesswork. For instance, if either party refuses to complete a contract of sale the measure of damages is the difference between the contract price and the market value.[3]

In the frequently cited case of *Hadley* v. *Baxendale*,[4] it is stated that profits can be recovered where they arise from the contract itself and may reasonably be supposed to have been in the contemplation of the parties when the contract was made, or where they arise from extraordinary circumstances depending

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[29] 95 U. S. 714 (1877).
[30] Wharton on Conflicts of Laws, 3rd Ed. p. 502.
[31] See reasoning of court in Ditson v. Ditson, 4 R. I. 87 (1856).
Maynard v. Hill, 125 U. S. 190 (1887), which held valid a legislative divorce, there being no notice to a non-resident libellee.

[1] Howard v. Stillwater etc. Co., 139 U. S. 199 (1890).
[2] Brigham v. Carlisle, 78 Ala. 243 (1887).
[3] Lincoln v. Alshuler, 142 Wis. 475 (1910).
[4] 9 Exechequer 341 (1854).

upon the fulfillment of the contract and of which the party to be charged had notice at the time of its execution.[5] Of the latter class are the well-known cases involving contracts of carriage of goods of immediate necessity and peculiar value to the owner, as, for instance, a theatrical outfit. There the loss of profits due to failure to deliver in time or in good condition is included in the damages, providing the carrier has notice of the nature of the goods.[6]

Of that class of profits coming under the heading of profits that arise naturally from the contract and are in contemplation of the parties, quite prominent are those arising from contracts of agency which provide for the compensation of the agent by a fixed proportion of the profits from sales made by him. As a rule such profits, or rather the compensation measured by a percentage of the probable profits, can be recovered, on the theory that the action is for the value of the contract broken and that it can be determined only by ascertaining the probable sales during the remainder of the term of the contract, and from them the profits.[7] On the other hand, in several jurisdictions the recovery has been confined to "earned" profits, *i. e.* those arising from sales actually negotiated by the agent, but repudiated by the principal when he broke the contract.[8] The authority of two of the decisions in support of the latter view is in doubt. *Washburn* v. *Hubbard*[9] was called to the attention of the court in *Wakeman* v. *Wheeler*, etc., Co.,[10] but it was ignored, and recovery was allowed for both actual and probable profits. *Howe etc. Co.* v. *Bryson*[11] was questioned in a subsequent case in the same jurisdiction and its conclusion in this respect practically pronounced *dictum*.[12]

The insurance agency cases are frequently cited as being in accord with the opinion that recovery should be limited to actual earned profits, since the damages are limited to a percentage of the premiums arising from renewals, but not from possible new policies. The accuracy of the life and actuary tables make the former sufficiently certain.[13]

A recent Massachusetts case extends the right to the recovery

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[5] For cases applying and approving this rule see Masterson v. Brooklyn, 6 Hill 61 (N. Y., 1845); Gagnon v. Sperry, 206 Mass. 547 (1910).

[6] Weston v. B. & M. R. R., 190 Mass. 298 (1906).

[7] Dennis v. Maxfield, 10 Allen 438 (Mass., 1865); Wakeman v. Wheeler, 101 N. Y. 205 (1886); Pittsburgh Guage Co. v. Ashton Valve Co., 184 Pa. 36 (1898); Schumacker v. Heineman, 99 Wis. 251 (1898); Cranmer v. Kohn, 7 S. D. 247 (1895); Hickhorn, etc. Co. v. Bradley, 117 Iowa 130 (1902).

[8] Union Refining Co. v. Barton, 77 Ala. 148 (1884); Bates v. Diamond Salt Co., 36 Neb. 900 (1893); Howe, etc. Co. v. Bryson, 44 Iowa 159 (1876); Washburn v. Hubbard, 6 Lansing 11 (N. Y., 1872).

[9] 6 Lansing 11 (N. Y., 1872).

[10] 101 N. Y. 205 (1886).

[11] 44 Iowa 159 (1876).

[12] Hickhorn, etc. Co. v. Bradley, 117 Iowa 130 (1902).

[13] Wells v. Mutual Life Ins. Association, 99 Fed. 222 (1900); Lewis v. Atlas Ins. Co., 61 Mo. App. 534 (1876).

of profits to an extreme degree.[14] The contract was one of agency for the sale of automobiles in a certain district. The contract was broken by the principal before any sales had been made by the agent. Nevertheless the latter was allowed to recover for loss of possible profits. Standards pointed out to aid the jury in arriving at the damages were the sales made by the defendant in the same district subsequent to the breach of this contract, and sales of other cars made by the plaintiff. Attention was called to the growth of the industry and the increased demand for motor driven vehicles. There is lacking, however, one important element: past profits earned under prior contracts or under the contract in question before it was broken. It is true that past profits are said to be too unreliable to warrant an attempt to assess damages for loss of future profits.[15] Nevertheless, they are invariably cited by the appellate courts as being of considerable importance in determining the proper damages. For this reason, *i. e.* that the element of past profits is lacking in the case given above, it would seem from remarks made in one case that loss of profits under these circumstances would not be included in the damages, even in those jurisdictions where it could ordinarily be recovered.[16] Another case involving the same situation is flatly contrary, but its jurisdiction takes a contrary view on the general question.[17]

It is interesting to note that in another Massachusetts case on facts quite similar, except that it was the agent who broke the contract, the principal was denied recovery of damages for the loss of future profits on the ground that they were too remote and too contingent.[18]

J. S. B.

FOREIGN CORPORATIONS—PERSONAL LIABILITY OF AGENT ACTING FOR UNREGISTERED CORPORATION—Under the Pennsylvania Act of Assembly of 1874,[1] a foreign corporation is required to establish an office in the state, with an appointed agent, and also t register with the Secretary of the Commonwealth, before it may transact any business. The Act provides a punishment in the way of fine and imprisonment for anyone who undertakes to act as agent for such a corporation before it has registered. There is no mention of civil liability of the agent in the statute, but the Pennsylvania courts have decided that he is personally

[14] Randall v. Peerless Motor Car Co., 99 N. E. Rep. 221 (Mass., 1912).
[15] Sutherland on Damages (3d edition), Vol. 1, Section 69.
[16] 7 S. D. 247 (1895).
[17] 78 Ala. 243 (1887).
[18] Hetherington & Sons v. Firth & Co., 210 Mass. 821 (1911).

[1] Act of April 22, 1874, P. L. 108 (Pa.).